

**FILED**

**NOV 26 2007**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE AREVALO-HUERTA,

Defendant - Appellant.

No. 07-50174

D.C. No. CR-06-02105-IEG-1

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Southern District of California  
Irma E. Gonzalez, Chief District Judge, Presiding

Submitted November 13, 2007<sup>\*\*</sup>

Before: TROTT, W. FLETCHER and CALLAHAN, Circuit Judges.

Jose Martin Arevalo-Huerta appeals the sentence imposed following his guilty plea to being a deported alien found in the United States in violation of 8 U.S.C. § 1326 (a) & (b). Arevalo-Huerta contends that, pursuant to the doctrine of

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<sup>\*</sup> This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

avoidance of constitutional doubt, the holding of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), is limited to the proposition that the fact of prior conviction need not be charged in the indictment where the defendant admits the prior conviction and subsequent deportation during a guilty plea, and alternately that *Almendarez-Torres* has effectively been overruled, such that 8 U.S.C. § 1326(b) is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). As Arevalo-Huerta concedes, these contentions are foreclosed. *See United States v. Covian-Sandoval*, 462 F.3d 1090, 1096-97 (9th Cir.2006), cert. denied, 127 S.Ct. 1866 (2007).

In accordance with *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062 (9th Cir.2000), we remand the case to the district court with instructions that it delete from the judgment the incorrect reference to § 1326(b). *See United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir.2000) (remanding sua sponte to delete reference to §1326(b))

**AFFIRMED and REMANDED.**